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OUTDATED AND INEFFECTIVE: AN ANALYSIS OF MICHIGAN'S GESTATIONAL SURROGACY LAW AND THE NEED FOR VALIDATION OF SURROGATE PREGNANCY CONTRACTS

"Simply having children does not make mothers."¹

INTRODUCTION

On July 28, 2009, Laschell Baker gave birth to twins, Ethan and Bridget.² Baker served as a gestational surrogate for Scott and Amy Kehoe, a couple from Grand Rapids, Michigan, who were unable to have a child due to infertility.³ After deciding to have a child via surrogate, the Kehoes contacted Baker through a pregnancy website.⁴ The couple chose to utilize both an egg and sperm donor for the pregnancy, so they therefore had no genetic relationship to either Ethan or Bridget.⁵ Baker initially relinquished the twins to the Kehoes, but she soon decided to petition a Michigan court for custody when she learned that Amy Kehoe was being treated for a mental illness.⁶ Baker asserted that she was afraid for the children's safety due to Amy Kehoe's illness and that a psychological screening of the Kehoes—recommended by many professional societies—may have prevented her from going through with the pregnancy.⁷ The court awarded custody to Baker due to her status as the birth mother and required the Kehoes to give the twins back to Baker one month after their birth.⁸

The Kehoes and Baker were all residents of Michigan, and they were prohibited from executing a valid gestational surrogacy contract to determine the parentage of the twins under Michigan's current statutory framework. Michigan's Surrogate Parenting Act (SPA) makes surrogacy contracts void and unenforceable, and imposes strict crimi-

1. John A. Shedd *Quotes*, THINKEXIST.COM, http://thinkexist.com/quotation/simply_having_children_does_not_make_mothers/210248 (last visited Feb. 8, 2012).

2. Stephanie Saul, *Building a Baby, with Few Ground Rules: Uncertain Laws on Surrogacy Can Leave Custody at Issue*, N.Y. TIMES, Dec. 13, 2009, at A1.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Saul, *supra* note 2.

nal penalties for entering into certain types of such contracts.⁹ As a result, parties seeking to have a child via surrogate in Michigan have no legal guarantee that their efforts will result in custody of the child.¹⁰

The SPA is now over twenty years old and “by today’s technical standards is completely outdated.”¹¹ It does not account for growing infertility rates and advancements in reproductive technology, which make having a child via surrogate a viable and attractive option for infertile couples and individuals.¹² Additionally, the SPA does not provide oversight, regulation, or intervention of gestational surrogate pregnancies unless something goes wrong. In *Doe v. Attorney General*, the Michigan appellate court articulated three specific interests the SPA seeks to protect; however, the current statutory framework does not protect the asserted interests in its practical application.¹³

Michigan should amend the SPA to address the growing need for regulation of gestational surrogate pregnancies. The current patchwork of surrogacy laws in the United States demonstrates that federal regulation of these contracts would be ideal;¹⁴ however, Michigan’s outright ban of gestational surrogacy contracts, coupled with its strict penalties, calls for immediate attention. New legislation validating gestational surrogacy contracts should be enacted to establish requirements that both the intended parents and surrogate must meet in order for the contract to be upheld. Such legislation would act as a statutory safeguard to protect the public interests asserted by Michigan. The current SPA is outdated and ineffective because it does not

9. See MICH. COMP. LAWS ANN. § 722.851 (West 2002); see also CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY 163 (2006).

10. MICH. COMP. LAWS ANN. § 722.855. Parents utilizing a surrogate cannot contractually determine parentage under the SPA because it is “[a]n Act to establish surrogate parentage contracts as contrary to public policy and void . . . and to provide for penalties and remedies.” *Id.* § 722.851 (editor’s caption) (emphasis added).

11. KINDREGAN & MCBRIEN, *supra* note 9, at 163.

12. See Pamela Laufer-Ukeles, Essay, *Approaching Surrogate Motherhood: Reconsidering Difference*, 26 VT. L. REV. 407, 409 (2002) (“In the last two decades, gestational surrogacy, which involves the use of *in vitro* fertilization (IVF), has become increasingly popular.”); Flavia Berys, Comment, *Interpreting a Rent-a-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour*, 42 CAL. W. L. REV. 321, 322 (2006); see also Jeremy J. Richey, Comment, *A Troublesome Good Idea: An Analysis of the Illinois Gestational Surrogacy Act*, 30 S. ILL. U. L.J. 169, 169 (2005) (“Unfortunately, some couples cannot naturally give birth to biological children but have healthy sex cells. For these couples, gestational surrogacy provides a way for them to raise children that are biologically their own.”).

13. MICH. COMP. LAWS ANN. § 722.851; *Doe v. Attorney Gen.*, 487 N.W.2d 484 (Mich. Ct. App. 1992).

14. See generally Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799 (2012).

prevent gestational surrogate pregnancies from occurring; it simply turns a blind eye to their existence. Situations like the one in which the Kehoes found themselves demonstrate that Michigan is behind the times. The SPA does not provide any legal protection for individuals—including the intended parents and surrogate—who decide to conceive a child through a surrogate pregnancy.

This Comment argues that the Michigan legislature should amend the SPA to validate gestational surrogacy contracts when all parties to the contract have met the requirements set forth by the model statute proposed by this Comment. Part II begins with a brief overview of gestational surrogacy.¹⁵ It then discusses the SPA and the government's interest in preventing gestational surrogacy contracts. In addition, it discusses statutes and case law from Illinois, New Hampshire, Utah, and California.¹⁶ Part III analyzes the Michigan Court of Appeals' reasoning in *Doe v. Attorney General* regarding Michigan's refusal to uphold gestational surrogacy contracts.¹⁷ It then examines the interests asserted by the *Doe* court in comparison to the statutes of Illinois, New Hampshire, and Utah. Part III argues that Michigan should adopt portions of each of these states' surrogacy laws to create legislation validating and regulating gestational surrogacy contracts. Part IV discusses the impact of the proposed legislation on gestational surrogacy contracts and the parties to these contracts.¹⁸ Additionally, it discusses the impact on family law courts and the attorneys who would be involved with contracts coming under the proposed legislation.

II. BACKGROUND

The use of a surrogate to conceive a child has become increasingly popular with infertility rates on the rise¹⁹ and the continuing advance-

15. See *infra* notes 19–28 and accompanying text.

16. See *infra* notes 29–86 and accompanying text.

17. See *infra* notes 87–140 and accompanying text.

18. See *infra* notes 141–55 and accompanying text.

19. Infertility is defined as the inability to conceive a child or carry a child to term due to a disease or “an interruption, cessation, or disorder of body functions, systems, or organs of the male or female reproductive tract.” *Infertility*, AM. SOC'Y FOR REPROD. MED., <http://www.reproductivefacts.org/topics/detail.asp?id=36> (last visited Aug. 22, 2011). Infertility in the United States is becoming a topic increasingly at the forefront of conversation as approximately 7.3 million women in the United States have an impaired ability to have children and 2.1 million married women ages 15–44 are considered infertile. *Infertility*, CDC, <http://www.cdc.gov/nchs/fastats/fertile.htm> (last visited Aug. 22, 2011). Advances in reproductive technology have allowed infertile couples, women, and same-sex couples to utilize a surrogate pregnancy as a means to have a child.

ment of reproductive technology.²⁰ Despite their sensitive nature and the volatile situations that can arise through the use of a surrogate, only seventeen jurisdictions have laws concerning surrogate pregnancies and accompanying contracts.²¹ “The remaining 34 states have mixed or unclear laws and/or court case rulings on whether surrogacy agreements are allowed.”²² This Part examines the surrogacy law of a number of states and some of the challenges associated with this area of law.²³

A. Defining Surrogate Pregnancies

Surrogate pregnancies are divided into two categories: traditional and gestational.²⁴ Prior to advances in reproductive technology enabling the use of in vitro fertilization (IVF) to conceive a child, artificial insemination was the only way to initiate a surrogacy pregnancy.²⁵ Under this approach, a traditional surrogate is artificially inseminated and conceives using her ovum and either the sperm of the intended father or that of a sperm donor. The surrogate is therefore both the child’s birth and genetic mother.²⁶

In contrast, a gestational surrogate has no genetic relationship to the child.²⁷ The gestational surrogate is implanted with an embryo through IVF that is created from either the sperm and ovum of the intended parents; the sperm of the intended father and an egg donor; the egg of the intended mother and a sperm donor; or the egg and

20. See Laufer-Ukeles, *supra* note 12, at 409.

21. *Surrogacy Laws: State by State*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/issues/2486.htm> (last visited Aug. 25, 2011); see also Christine Metteer Lorillard, *Informed Choices and Uniform Decisions: Adopting the ABA’s Self-Enforcing Administrative Model to Ensure Successful Surrogacy Arrangements*, 16 CARDOZO J.L. & GENDER 237, 239 (2010) (describing state legislation).

22. *Surrogacy Laws: State by State*, *supra* note 21. “The vast majority of states are silent or near silent on the issues of whether, when, and how surrogacy agreements are enforceable, void, or voidable. . . . In many of the states that are ‘silent’ on surrogacy, bills have been shot back-and-forth through the legislature but come to naught.” Lorillard, *supra* note 21, at 239 n.20 (alteration in original) (quoting Darra L. Hofman, “Mama’s Baby, Daddy’s Maybe:” A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact, 35 WM. MITCHELL L. REV. 449, 454 (2009)). “Hofman has also observed that ‘[o]f those states that do have laws on the books regarding such agreements, the responses range from relying heavily on the Uniform Parentage Act or party intent to outright bans or even criminalization of surrogacy.’” *Id.* (alteration in original) (quoting Hofman, *supra*, at 454).

23. See Hofman, *supra* note 22, at 454–60.

24. See Lorillard, *supra* note 21, at 244.

25. Steven H. Snyder & Mary Patricia Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings*, 39 FAM. L.Q. 633, 639 (2005).

26. *Id.*

27. KINDREGAN & MCBRIEN, *supra* note 9, at 132. For the purpose of this Comment, “surrogate pregnancy” refers to gestational surrogate pregnancies.

sperm of two donors.²⁸ The ability to utilize a gestational surrogate to conceive a child has led many states to enact legislation dealing with the unique legal issues raised by this reproductive arrangement.

B. Michigan Gestational Surrogacy Law

Michigan is one of eleven states that hold surrogacy contracts void and unenforceable, and one of three states to impose civil or criminal penalties on those who enter into, or aid in the creation of, a gestational surrogacy contract for compensation.²⁹ In *Doe v. Attorney General*, a 1992 decision upholding the SPA, the Michigan Court of Appeals articulated a set of interests the legislature was purporting to protect with the passage of the SPA.³⁰ However, the appellate court has never revisited whether the interests articulated in *Doe* are actually being protected by the SPA, despite numerous advances in reproductive technology and the growing popularity of utilizing a surrogate to conceive.

1. Michigan's Surrogate Parenting Act

The Michigan legislature passed the SPA in 1988 to address gestational surrogacy contracts both with and without compensation. The SPA defines a surrogate parentage contract as “a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation, and to voluntarily relinquish her parental or custodial rights to the child.”³¹ A person may “not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract for compensation.”³² Compensation is defined as “a payment of money, objects, services, or anything else having monetary value except payment of expenses incurred as a result of the pregnancy and the actual medical expenses of a surrogate mother or surro-

28. *Id.* at 132–33.

Gestational surrogates are most typically used when the woman of a married couple has viable eggs but cannot carry a child to term. Such a gestational surrogacy arrangement enables an infertile couple to maintain a genetic connection to the resulting children when their own gametes are used to produce an embryo that is transferred to the womb of the surrogate.

Id. at 133.

29. D.C. CODE § 16-402(b) (2001); MICH. COMP. LAWS ANN. § 722.859 (West 2002); N.Y. DOM. REL. LAW § 123(2)(a)–(b) (McKinney 2010); see also Carla Spivak, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 101 (2010).

30. See *Doe v. Attorney Gen.*, 487 N.W.2d 484, 486–87 (Mich. Ct. App. 1992).

31. MICH. COMP. LAWS ANN. § 722.853(i).

32. *Id.* § 722.859(1).

gate carrier.”³³ The SPA not only codifies that gestational surrogacy contracts are void and unenforceable, but also imposes criminal penalties on any party entering into such a contract for compensation.³⁴

A participating party . . . who knowingly enters into a surrogate parentage contract for compensation is guilty of a misdemeanor punishable by a fine of not more than \$10,000.00 or imprisonment for not more than 1 year, or both.³⁵ A person other than a participating party who induces, arranges, procures, or otherwise assists in the formation of a surrogate parentage contract for compensation is guilty of a felony punishable by a fine of not more than \$50,000.00 or imprisonment for not more than 5 years, or both.³⁶

The strictness of Michigan’s SPA makes it “arguably the most anti-surrogacy [state] in the United States.”³⁷

2. Doe v. Attorney General

The Michigan Court of Appeals has not addressed the SPA for nineteen years. In *Doe*, the plaintiffs, a group of infertile couples and potential surrogates, challenged the SPA on the grounds that it denied them their state and federal constitutional rights to privacy, due process, and equal protection.³⁸ The plaintiffs asserted that the state had no compelling interest in intervening in conduct related to surrogate pregnancies. The appellate court disagreed, holding that the legislature had a compelling interest sufficient to justify intrusion into the plaintiffs’ rights to procreate via surrogacy.³⁹ The appellate court articulated three interests justifying its holding.

First, the appellate court reasoned that the government had a compelling interest in preventing children from becoming merchandise, as surrogacy for profit could encourage treatment of babies as commodities.⁴⁰ Second, it found that the SPA furthered the government’s compelling interest in protecting the best interests of the child. Because surrogacy arrangements focus entirely on the parents’ desire, parties to a surrogacy arrangement are apt to be insensitive to the best inter-

33. *Id.* § 722.853(a).

34. *Id.* §§ 722.855, .859.

35. *Id.* § 722.859(1).

36. *Id.* § 722.859(2)–(3).

37. KINDREGAN & MCBRIEN, *supra* note 9, at 163. There is no contract protection in Michigan, and intended parents would likely have no judicial recourse if a dispute arose regarding the pregnancy or custody of the child. *Id.*

38. *Doe v. Attorney Gen.*, 487 N.W.2d 484, 485 (Mich. Ct. App. 1992).

39. *Id.* at 486–87.

40. *Id.* (“It could be only a matter of time before desirable, healthy babies would come to be ‘viewed quantitatively, as merchandise that can be acquired, at market or discount rates.’” (quoting Shari O’Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. REV. 127, 144 (1986))).

ests of the child.⁴¹ The appellate court expressed concern that emotional trauma would be inflicted upon the child if one of the parties to a gestational surrogacy contract “has a change of heart” and a custody battle ensues.⁴² Third, the court stated that preventing the exploitation of women is a compelling interest and expressed concern that women compensated for surrogacy services would be reduced to the status of “breeding machines” and that such a system would create gender- and economic-based exploitation.⁴³ The appellate court concluded that surrogate pregnancy contracts, no matter how they are created, logically dictate that there be no connection between the birth mother and the child and that if such contracts were to be validated, “every surrogate mother would soon be cast in the role of an ‘unfeeling, emotionless machine whose purpose is to create a life and then disappear.’”⁴⁴

C. Illinois Gestational Surrogacy Law

In contrast to the SPA, Illinois’s Gestational Surrogacy Act (GSA) is arguably the most comprehensive surrogacy legislation. It not only validates surrogacy contracts, but permits reasonable compensation to the surrogate.⁴⁵ The Illinois legislature enacted the GSA in 2005 to establish consistent standards and procedural safeguards for all parties to a gestational surrogacy contract and to establish the parentage of children born under such contracts prior to birth.⁴⁶

41. *Id.* at 487. In *In re Baby M*, quite possibly the most famous surrogacy case, the Supreme Court of New Jersey held that a traditional surrogacy contract requiring a paid surrogate to surrender custody of the child to the intended parents was void. 537 A.2d 1227, 1234 (N.J. 1988). The court awarded custody to the biological father (the intended mother had no genetic relationship to the child), but also granted visitation rights to the surrogate. *Id.* The court went on to state that the long-term effects of surrogacy contracts were unknown but feared. *Id.* at 1250. It is also interesting to note that while some states, even Michigan, allow compensation to the surrogate for medical and other expenses incurred during the pregnancy, New Jersey prohibits any and all payments to a surrogate. KINDREGAN & MCBRIEN, *supra* note 9, at 167–68.

42. *Doe*, 487 N.W.2d at 487.

43. *Id.*

44. *Id.* (quoting Steven M. Recht, Note, “M” Is for Money: Baby M and the Surrogate Motherhood Controversy, 37 AM. U. L. REV. 1013, 1022 (1988)).

45. KINDREGAN & MCBRIEN, *supra* note 9, at 157.

46. 750 ILL. COMP. STAT. 47/5 (2010).

Section 5 of the GSA contains the act’s purposes. There, the Illinois General Assembly communicated a twofold purpose. The purpose’s first prong protects the parties to gestational surrogacy contracts by creating consistent standards and procedural safeguards. The second prong confirms the legal status of the children resulting from gestational surrogacy contracts. Section 5 further communicates that the standards and safeguards established by the GSA help ensure that gestational surrogacy contracts are used in such a way that they are consistent with Illinois public policy.

Rickey, *supra* note 12, at 172 (footnotes omitted) (internal quotation marks omitted).

The GSA establishes safeguards for surrogate contracts by setting forth a number of eligibility requirements that the intended parents and the surrogate must meet.⁴⁷ A gestational surrogate must meet six requirements at the time the gestational surrogacy contract is executed. She must (1) be at least twenty-one years old; (2) have previously given birth; (3) have completed a medical evaluation; (4) have completed a mental health evaluation; (5) have consulted an independent attorney to discuss the terms of the contract and the potential legal consequences for entering into the contract; and (6) have obtained a health insurance policy that meets certain requirements, but only if the contract does not require the intended parents to obtain a policy for her.⁴⁸ Intended parents, on the other hand, must meet four requirements at the time the contract is executed: (1) if there is only one intended parent, that person must provide one of the gametes used to create the embryo, or if the intended parents are a couple, one of them must provide a gamete used in the creation of the embryo; (2) the intended parents must demonstrate a medical need for the use of a gestational surrogate supported by an affidavit from a qualified medical professional; (3) the intended parents must undergo a mental health evaluation; and (4) they must consult an independent attorney to discuss the terms and potential legal consequences of the contract.⁴⁹

In addition to creating eligibility requirements for the surrogate and intended parents, the GSA also sets forth requirements for the contract itself.⁵⁰ A gestational surrogacy contract must be in writing, witnessed by two competent adults, and executed prior to any medical procedures (other than the required medical and mental health evaluations). The signed contract must additionally contain a written acknowledgement stating that the gestational surrogate and the intended parents received information about their legal, financial, and contractual rights and the expectations, penalties, and obligations of the contract. Finally, if the contract provides for compensation, it must be placed in escrow before the commencement of any medical procedure.⁵¹

The GSA's parentage determinations apply only when the surrogate and intended parents satisfy all requirements.⁵² The intended

47. See 750 ILL. COMP. STAT. 47/20.

48. *Id.* § 47/20(a)(1)–(6).

49. *Id.* § 47/20(b).

50. See *id.* § 47/25(a).

51. *Id.* § 47/25(b).

52. See *id.* § 47/15(b). The GSA also includes a provision that the intended parents still have a duty to support any child resulting from the pregnancy even if they breach the surrogacy contract. *Id.* § 47/30(a)–(b).

parent is deemed the child's legal parent for the purposes of state law immediately upon the birth of the child, and the child is considered the legitimate child of the intended parent.⁵³ Neither the gestational surrogate nor her husband is considered the parent of the child.⁵⁴ The GSA provides for the establishment of parentage before the child's birth upon certification of the request for prebirth parentage from the state department of public health.⁵⁵ By creating this procedure, the GSA eliminates the need for court supervision or intervention.⁵⁶

D. New Hampshire Surrogacy Law

In New Hampshire, both the surrogate and the intended parents must meet certain eligibility requirements for judicial approval of a gestational surrogacy contract before implantation of any embryos.⁵⁷ All parties to a gestational surrogacy contract must be at least twenty-one years old.⁵⁸ The surrogate must be medically acceptable, which requires that she be in good health and have had at least one pregnancy that resulted in a viable delivery.⁵⁹ The intended mother must be infertile, and one of the intended parents must provide a gamete used to create the embryo that will be implanted into the surrogate.⁶⁰ Additionally, the egg must be from either the intended mother or the surrogate,⁶¹ precluding the possibility of using an egg donor, even if the intended father's sperm is used.

New Hampshire also established requirements for the contract itself in order to achieve judicial pre-approval.⁶² The contract must be signed by the intended parent, surrogate, and surrogate's husband (if

53. 750 ILL. COMP. STAT. 47/15(b) (“[P]arental rights shall vest in the intended parent or parents immediately upon the birth of the child [and] sole custody of the child shall rest with the intended parent or parents.”).

54. *Id.* § 47/15(b)(6).

55. *Id.* § 47/25(b)(2) (“[A gestational surrogacy contract] shall be executed prior to the commencement of any medical procedures”); *see also* KINDREGAN & MCBRIEN, *supra* note 9, at 157. “The required certifications must be on Illinois Department of Public Health forms and must be filed in a manner consistent with the Illinois Parentage Act of 1984.” Richey, *supra* note 12, at 175.

56. KINDREGAN & MCBRIEN, *supra* note 9, at 157. The GSA also provides for situations in which the gestational surrogate is implanted with the wrong embryo; namely, when the intended parents have no genetic relationship to the resulting child. In this event, the intended parents are still considered the legal parents of the child under Illinois law “unless otherwise determined by a court of competent jurisdiction.” Richey, *supra* note 12, at 174 (quoting 750 ILL. COMP. STAT. 47/15(c)).

57. N.H. REV. STAT. ANN. § 168-B:25 (1955 & repl. vol. 2002).

58. *Id.* § 168-B:17(I).

59. *Id.* § 168-B:17(V).

60. *Id.* § 168-B:17(II), (III).

61. *Id.* § 168-B:17(IV).

62. *See id.* § 168-B:16(I).

she is married) and must include the following provisions: (1) the consent of the surrogate and husband (if she is married), stating that they will either surrender custody of the child or accept the responsibilities of parenthood if the surrogate gives adequate notice of an intent to keep the child; (2) the consent of the intended parents that they will accept the responsibilities of custody of the child, unless the surrogate gives adequate notice of her intent to keep the child; (3) the surrogate's right to keep the child if she meets the notice requirements outlined below; and (4) if the surrogate will receive a fee, a provision that the fee be limited only to pregnancy-related medical expenses, lost wages related to the pregnancy, insurance, reasonable attorney fees and court costs, and costs related to nonmedical expenses such as mental health evaluations and home studies.⁶³ New Hampshire allows a surrogate to keep the child if at any time within seventy-two hours after giving birth she executes a signed writing indicating her intent to keep the child and delivers the writing either to the intended parents, attending physician, or hospital medical director.⁶⁴ This right may be exercised only by the surrogate herself, not by a guardian or representative of the surrogate.⁶⁵

E. Utah Surrogacy Law

Utah's stance on gestational surrogacy contracts is of particular interest because prior to the state's enactment of the Uniform Parentage Act (UPA), Utah prohibited gestational surrogacy contracts.⁶⁶ However, in 2005 the Utah legislature changed its position 180 degrees when it enacted the UPA, which validates these contracts.⁶⁷

Utah's version of the UPA establishes requirements that the intended parents and surrogate must meet in order for a gestational surrogacy contract to be upheld.⁶⁸ Utah is the only state other than Illinois that allows the intended parents to reasonably compensate a surrogate for her services.⁶⁹ All parties to a surrogacy contract must be at least twenty-one years old and have gone through sufficient mental health counseling, evidenced by a signed certificate from a mental health professional.⁷⁰ The surrogate must have had at least one other pregnancy and successful delivery, and the pregnancy must

63. N.H. REV. STAT. ANN. § 168-B:25.

64. *Id.* § 168-B:25(IV).

65. *Id.*

66. KINDREGAN & MCBRIEN, *supra* note 9, at 175 & n.198.

67. *Id.*

68. UTAH CODE ANN. §§ 78B-15-802 to -803 (LexisNexis 1953 & repl. vol. 2008).

69. 750 ILL. COMP. STAT. 47/25(b)(4) (2010); UTAH CODE ANN. § 78B-15-803(h).

70. UTAH CODE ANN. § 78B-15-803(d), (i).

not create an undue risk to the life of the unborn child or the physical or mental health of the surrogate.⁷¹ Additionally, an egg of the surrogate may not be used to create the embryo, and if the surrogate is married, her husband's sperm likewise may also not be used.⁷² The intended parents must demonstrate through medical evidence that the intended mother is unable to conceive or carry a child to term without risk to her physical or mental health.⁷³ Utah's UPA also requires the intended parents to undergo a home study to determine if they meet the standards of fitness applicable to adoptive parents, unless a tribunal waives this requirement.⁷⁴ Finally, Utah's UPA does not permit a contract for the birth of a child in which neither of the intended parents is the donor of genetic material.⁷⁵

Under Utah's UPA, if the gestational surrogacy contract meets the requirements established under the UPA, the intended parents may petition a tribunal to validate their contract, and this tribunal then has the authority to declare the intended parents the legal parents of the child.⁷⁶ However, before a petition to validate the contract can be brought in front of a tribunal, Utah requires that either the intended parents or surrogate reside within Utah for ninety days.⁷⁷

F. California Surrogacy Case Law

California has more surrogacy cases than any other state in the country; however, it does not have a statute directly dealing with surrogate pregnancies or contracts.⁷⁸ California courts have referred to the general provisions of the 1973 Uniform Parentage Act (1973 UPA),⁷⁹ and they have used it to determine a number of contested

71. *Id.* § 78B-15-803(f).

72. *Id.* § 78B-15-801(7), (8).

73. *Id.* § 78B-15-803(2)(b).

74. *Id.* § 78B-15-803(2)(c).

75. *Id.* § 78B-15-801(5).

76. UTAH CODE ANN. §§ 78B-15-802 to -803.

77. *Id.*

78. KINDREGAN & MCBRIEN, *supra* note 9, at 149, 152. "California is illustrative of jurisdictions that have no statutory provisions governing surrogacy but expressly allow prebirth parentage determinations." Snyder & Byrn, *supra* note 25, at 643.

79. UNIF. PARENTAGE ACT (1973).

When work on this Act began, the notion of substantive legal equality of children regardless of the marital status of their parents seemed revolutionary if one considered existing state law on this subject. Even though the Conference had put itself on record in favor of equal rights of support and inheritance in the Paternity Act and the Probate Code, the law of many states continued to differentiate very significantly in the legal treatment of legitimate and illegitimate children.

surrogacy cases.⁸⁰ California was the first state to look at the parties' intention, rather than biology or gestation, to determine parentage in contested surrogacy cases.⁸¹

In *Johnson v. Calvert*, a gestational surrogate threatened to seek custody of an unborn child genetically related to the intended parents.⁸² The intended parents subsequently sought a prebirth parentage determination declaring them the legal parents of the unborn child.⁸³ The California Supreme Court noted that, under the 1973 UPA, both genetics and gestation were sufficient to establish parentage, but that a child could not have two legal mothers.⁸⁴ The court then looked to the original intent of the parties—that the intended parents would be the legal parents of the child—to determine parentage in favor of the intended parents.⁸⁵ “The *Johnson* decision stands for the proposition that under California law, when genetic consanguinity and giving birth do not coincide in one woman, ‘she who intended to bring about the birth of a child that she intended to raise as her own is the natural mother.’”⁸⁶

This Act is promulgated at a time when the states need new legislation on this subject because the bulk of current law on the subject of children born out of wedlock is either unconstitutional or subject to grave constitutional doubt.

Id. (citation omitted).

80. Snyder & Byrn, *supra* note 25, at 643–44.

81. KINDREGAN & MCBRIEN, *supra* note 9, at 149. Advocates of the intentionalist view argue that the intention of the intended parents regarding the pregnancy should be legitimized, and therefore, the intended parents should be declared the legal parents of the child. Stephanie F. Schultz, Comment, *Surrogacy Arrangements: Who Are the “Parents” of a Child Born Through Artificial Reproductive Techniques?*, 22 OHIO N.U. L. REV. 273, 282 (1995). In entering into a surrogacy arrangement, the intended parents expend a vast amount of time, energy, and money, and the intentionalists argue that the intended parents should be given custody of their child due to their deliberate choice to bring about the birth of the child. *Id.* “It seems logical that since parenthood is such an important and long-term commitment, it would be preferable for individuals to be more purposeful about their procreative intentions.” *Id.*

82. *Johnson v. Calvert*, 851 P.2d 776, 778 (Cal. 1993).

83. *Id.*

84. *See id.*

85. *See id.*

86. KINDREGAN & MCBRIEN, *supra* note 9, at 149–50 (quoting *Johnson v. Calvert*, 5 Cal. 4th 84, 93 (1993)). California courts also dealt with the intent rule when examining child support responsibility of a divorced couple that conceived a child through a surrogate pregnancy. *See Buzzanca v. Buzzanca (In re Marriage of Buzzanca)*, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998) (“In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents.”). The appellate court held that the father (who had no genetic relationship to the child) was responsible for support payments because he had initially intended to raise the child as its legal father. *Id.* at 293–94; *see also Jaycee B. v. Superior Court of Orange Cnty.*, 49 Cal. Rptr. 2d 694, 702 (Ct. App. 1996) (stating that the intended father, who was not genetically related to the child born through a gestational surrogate pregnancy, was nonetheless responsible for child support because but for the acted upon intentions of the intended parents, the child would not exist).

III. ANALYSIS

In *Doe v. Attorney General*, the Michigan Court of Appeals cited the compelling need to protect both the children and women of surrogate pregnancies as the policy supporting the SPA.⁸⁷ Upon first glance, this policy seems sufficiently compelling to warrant governmental intrusion into a sphere generally treated with the utmost privacy; however, the reasoning behind that policy and its practical application fall short of the asserted objective. The fallibility of the SPA is best seen by comparing the interests stated in *Doe* to the much more comprehensive legislation and case law of states that validate gestational surrogacy contracts.

The Michigan legislature should amend the SPA to uphold gestational surrogacy contracts by following the structure utilized by states such as Illinois, New Hampshire, Utah, and California to form its new legislation. By amending the SPA, Michigan can impose requirements that must be met by the intended parents and surrogate in order for a contract to be valid. These measures will ensure that the intended parents and surrogate are not only willing, but also capable of entering into such an arrangement.

A. Analysis of *Doe v. Attorney General*

1. Preventing Children from Becoming Commodities

The SPA provides some of the strictest penalties of any surrogacy legislation in the United States regarding surrogacy contracts for compensation.⁸⁸ The *Doe* court articulated the legislature's fear that children would become commodities as a basis for upholding the SPA. The court stated that whatever idealism motivates a woman to become a surrogate is run "asunder" by the introduction of profit into such arrangements.⁸⁹ However, in spite of the *Doe* court's concern, the dreaded baby-selling market does not exist in states that permit compensation to surrogates.

87. The first interest asserted by the court was preventing children from becoming commodities, the second was the protection of the best interests of the child, and third was the interest in the prevention of the exploitation of women. *Doe v. Attorney Gen.*, 487 N.W.2d 484, 486–87 (Mich. Ct. App. 1992).

88. MICH. COMP. LAWS ANN. § 722.859(2)–(3) (West 2002). A participating party is defined as "a biological mother, biological father, surrogate carrier, or the spouse of a biological mother, biological father, or surrogate carrier." *Id.* § 722.853(e).

89. *Doe*, 487 N.W.2d at 486. "It could be only a matter of time before desirable, healthy babies would come to be 'viewed quantitatively, as merchandise that can be acquired, at market or discount rates.'" *Id.* at 486–87 (quoting O'Brien, *supra* note 40, at 144).

In determining that permitting compensation to a surrogate would naturally lead to the creation of a baby-selling market, the *Doe* court assumed that the birth of a child using a gestational surrogate is much easier than it actually is in practice.⁹⁰ According to the Society for Assisted Reproductive Technology (SART), there were approximately 141,000 attempts at conceiving a child through IVF in 2008, and only 801 attempts were made using a surrogate.⁹¹ Of those 801 attempts, approximately 290 resulted in the live birth of a child.⁹² The small number of children born each year through surrogate pregnancies suggests that the creation of a thriving baby-selling market through compensation is not a realistic outcome.

Michigan's outright ban on any surrogacy contracts, in fact, does not protect against the possibility of a baby-selling market. Instead, it creates an environment with no oversight or regulation of transactions between surrogates and intended parents. By enforcing surrogacy contracts, the Michigan legislature would be able to regulate the time before, during, and after a gestational surrogate pregnancy takes place, just as the GSA has given Illinois a greater ability to regulate these pregnancies.⁹³

The GSA provides an extensive list of requirements that the parties and the contract must meet before any action to create the pregnancy takes place.⁹⁴ These requirements create safeguards that serve to protect all parties involved.⁹⁵ The SPA provides no such protection, simply holding such contracts unenforceable and implementing criminal penalties for contracts providing for compensation.

When the low birthrate from surrogate pregnancies is examined in conjunction with the demanding and comprehensive requirements

90. *See id.*

91. *See Clinical Summary Report*, SART, https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?ClinicPKID=0 (last visited Sept. 8, 2011). SART is the primary organization of professionals in the practice of assisted reproductive technology, and represents over eighty-five percent of the assisted reproductive technologies clinics in the United States. *What Is SART?*, SART, <http://www.sart.org/detail.aspx?id=1864> (last visited Sept. 8, 2011).

92. *IVF Success Rate Reports, SART National Summary 2008*, SART, https://www.sartcorsonline.com/rptCSR_PublicMultYear.aspx?ClinicPKID=0 (last visited Feb. 25, 2011) [hereinafter *IVF Success Rate Reports*].

93. Lori B. Andrews, Commentary, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 VA. L. REV. 2343, 2368–69 (1995) (“Enforcing contracts can help demonstrate that children are not fungible commodities, but unique individuals. . . . ‘[T]he more every child is unique, the more . . . children are neither fungible nor reducible to specific traits, the stronger the claim for specific performance upon breach of any such agreement.’” (quoting Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender-Neutrality*, 1990 WIS. L. REV. 297, 364)).

94. *See* 750 ILL. COMP. STAT. 47/20 (2010).

95. *Id.* § 47/5.

provided for under the GSA, the creation of a baby-selling market in Illinois seems nearly impossible. The concerns expressed in *Doe* should be given serious consideration, but utilizing an outright ban of surrogacy contracts to deal with those concerns has been ineffectual. Michigan's ban prevents any regulation of these activities, which creates a greater potential for a baby-selling market than in Illinois where reasonable compensation of a surrogate is permitted.

2. *Protecting the Best Interests of the Child*

The *Doe* court articulated two concerns regarding the best interests of children: (1) surrogacy agreements focus solely on the desires and interests of the parents⁹⁶ and (2) the damage to children due to the custody battles that would occur if one of the parties to a surrogacy contract had a change of heart.⁹⁷ The court's first concern deals with the competing bonds between the child and her biological mother versus the bond between the child and her intended mother, as well as the potential harm to the child when she learns of her manner of birth.⁹⁸ The court stated that surrogacy contracts naturally focus solely on the interests of the parties involved, but did not further articulate how this concern is actually manifested.⁹⁹ By utilizing the best interests of the child standard, the court seemed to express concern regarding the effect on a child of being parented by someone other than the biological mother. It is well established that infants who are unable to form a bond with an adult during early childhood are less likely to have the ability to form enduring relationships later in life.¹⁰⁰ While this suggests the importance of a child developing a bond to at

96. *Doe v. Attorney Gen.*, 487 N.W.2d 484, 487 (Mich. Ct. App. 1992) (“[T]he parties are apt to be insensitive to what would be in the children’s best interests. That position is in direct opposition to the child custody law in this state.”).

97. *Id.* (stating that a change of heart by one of the parties would no doubt “inflict grievous wounds upon the child regardless of who prevails”).

98. John Lawrence Hill, *What Does It Mean to Be a “Parent”? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 400–01 (1991) (“In general, it is argued that separating the child from the birth mother may affect the child adversely in two ways. First, the child may incur irrevocable psychological harm because the parent and the child fail to develop an emotional “bond.” . . . Second, the child may experience psychological harm due to uncertainty regarding its biological heritage.” (footnote omitted)).

99. *Doe*, 487 N.W.2d at 487.

100. Hill, *supra* note 98, at 401–02. “One study found a strong correlation between insecurely attached infants and those who experience a higher level of nonmaternal care in the first year of life.” *Id.* at 402. Other studies indicate that the attachment of a child to an adult figure in infancy may have an affect on the IQ of that child. *Id.* Throughout the 1960s and 1970s, researchers began to observe what appeared to be an increase in the cases of child abuse suffered by children born prematurely. *Id.* at 401. Therein developed a body of evidence suggesting that there must be a bond developed between the parents and the “child during a critical period early in infancy—according to some, within twelve hours of birth.” *Id.*

least one parent, no evidence supports the contention that the attachment must be formed with the biological parent.¹⁰¹ The legislature expressed concern regarding children born to surrogate pregnancies, but enacted legislation that, in actuality, does not protect that interest. Banning surrogacy contracts does not prevent surrogate pregnancies from taking place, as evidenced by situations such as the Kehoes'; it only prevents those pregnancies from being regulated. In fact, some Michigan medical groups provide and advertise gestational surrogate services¹⁰² despite the fact that no contract can be entered into by the parties legally determining the parentage of the child.

Illinois, New Hampshire, and Utah have legislation that better ensures that children born to surrogate pregnancies will be placed with an adult ready and able to care for the child during critical stages of infancy.¹⁰³ Under the Illinois GSA, the parentage of the child is established prebirth, allowing the child to begin bonding with the intended parents immediately upon its birth.¹⁰⁴ New Hampshire and Utah go even further by requiring judicial approval of a surrogate parenting contract before the surrogate can be impregnated with the embryo.¹⁰⁵ These regulations protect the best interests of child far better than the SPA because the legislatures are able to enact safeguards, such as mental health evaluations, reviews by independent counsel, and judicial oversight. These safeguards protect the well-being of children by allowing them to bond immediately with the intended parents and ensuring that the intended parents are fit.

The *Doe* court also stated a concern that the psychological well-being of children born to surrogate pregnancies, especially those for compensation, would be irreparably harmed if they learned of the circumstances of their birth.¹⁰⁶ However, as one commenter has suggested, how can one make the argument that children born to surrogacy agreements, even those for compensation, would be better off not being born at all?¹⁰⁷ As surrogate Jan Sutton stated, "The child born of this process is not 'bought,' 'rejected,' 'abandoned,' or 'sold,' but it is 'planned,' 'desired,' 'loved,' 'given,' and 'nurtured' by

101. *Id.* at 403. "What is important is the psychology, not the biology, of the relationship." *Id.*

102. *Female Gestational Carrier*, REPROD. MED. ASSOCIATES MICH., <http://www.rmami.com/treatments-female-gestational-carrier-troy-michigan.html> (last visited Feb. 9, 2012).

103. See 750 ILL. COMP. STAT. 47 (2010); N.H. REV. STAT. ANN. § 168-B:16 (1955 & repl. vol. 2002); UTAH CODE ANN. § 78B-15-801 (LexisNexis 1953 & repl. vol. 2008).

104. 750 ILL. COMP. STAT. 47/35(a).

105. N.H. REV. STAT. ANN. § 168-B:16(I); UTAH CODE ANN. § 78B-15-803.

106. See *Doe v. Attorney Gen.*, 487 N.W.2d 484, 487 (Mich. Ct. App. 1992); see also Hill, *supra* note 98, at 403 ("It is argued that . . . a child will be disadvantaged by the 'unnatural' procreative process that brought her into the world.").

107. Andrews, *supra* note 93, at 2358.

the adults involved.”¹⁰⁸ The real danger to the best interests of the child does not stem from the child learning that she was a product of a surrogacy agreement or even that her parents compensated the surrogate for her services, but from the uncertainty put into place by Michigan’s outright ban on surrogate pregnancy agreements and the accompanying criminal penalties for contracts including compensation.¹⁰⁹

The *Doe* court asserted that the custody battles that would inevitably follow when a party to a surrogacy agreement changed her mind would cause further psychological harm to the child.¹¹⁰ However, the court assumed that custody battles would only arise in the context of surrogacy contracts, an assumption dispelled by the situation in which the Kehoes found themselves. Surrogacy contracts like those enforced in Illinois, New Hampshire, and Utah establish parentage before the child is even born. This prebirth parentage determination serves to prevent custody battles, especially in states that require judicial approval for surrogacy contracts, by legally establishing the parents of the child before a pregnancy even takes place.

3. Preventing the Exploitation of Women

The Michigan Court of Appeals stated that protecting women from both gender- and economic-based exploitation is a compelling reason for the legislature to enact the SPA.¹¹¹ The court assumed that if surrogate pregnancy contracts were upheld, “every surrogate mother

108. *Id.* Another surrogate interviewed by Andrews stated:

I don’t see how the children could possibly feel anything negative. . . . These children will feel special. . . . No one accidentally got pregnant. No one just had sex with their boyfriend or had fifteen kids and another one came along who they had to place for adoption. There were two couples carefully considering whether or not to bring a child into the world.

Id. (alterations in original) (quoting LORI ANDREWS, BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, & BRAVE NEW BABIES 275 (1989)). For further discussion of this point, see LORI B. ANDREWS, NEW CONCEPTIONS: A CONSUMER’S GUIDE TO THE NEWEST INFERTILITY TREATMENTS, INCLUDING *IN VITRO* FERTILIZATION, ARTIFICIAL INSEMINATION, AND SURROGATE MOTHERHOOD (1984); Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 LAW, MED. & HEALTH CARE 72 (1988).

109. See Andrews, *supra* note 93, at 2358 (“[C]hildren [can] be stigmatized as the product of a criminal act and (in the case of contract nonenforcement) can lead to the child being subjected to years of litigation to determine who will be considered his or her legal parents.”).

110. *Doe*, 487 N.W.2d at 487 (“The long-term effects are by no means limited to the emotional trauma that might result from knowing of the purchase and sale aspect of one’s birth. The custody battles that in all likelihood will occur where one of the parties to a surrogacy contract has a change of heart, no doubt, will inflict grievous wounds upon the child regardless of who prevails.”).

111. *Id.* (“Surrogacy-for-profit arrangements have the potential for demeaning women by reducing them to the status of ‘breeding machines.’”).

would soon be cast in the role of an 'unfeeling, emotionless machine whose purpose is to create a life and then disappear.'"¹¹² This reasoning doubts a woman's individual ability to decide what is right for her and for her life. The court feared that surrogacy contracts for compensation would inevitably place economically disadvantaged women in the position of "breeding machines" for affluent couples.¹¹³ It appears that the reality is very different. While compensation may be a motive for some women to become surrogates, most are motivated by other reasons.¹¹⁴ Studies suggest that women who become surrogates do so for reasons such as wanting to help an infertile couple because their own life had been touched by infertility, wanting to give couples the chance to be parents, and receiving the benefits—such as personal satisfaction garnered from helping a couple to have a child—of being a surrogate.¹¹⁵

The *Doe* court further reasoned that it is the surrogate who bears any burden under a surrogacy contract, as it is her life that is put in danger and it is her conduct that is restricted.¹¹⁶ Under Michigan law, this can be the case. Uncompensated surrogate pregnancies are not criminalized pursuant to the SPA, but the legislature and courts have no ability to require participation from the intended parents.¹¹⁷ In contrast, in states such as Illinois, New Hampshire, and Utah, the intended parents are required to undergo mental health evaluations, and Illinois also requires the intended parents to obtain independent

112. *Id.* (quoting Recht, *supra* note 44, at 1022).

113. *Id.*

114. Andrews, *supra* note 93, at 2353; Richey, *supra* note 12, at 190; see also Lori B. Andrews & Lisa Douglass, Comment, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 674 (1991) ("Recent psychological studies of surrogates show the following reasons for these women's decisions to participate. Some said they were impressed by the plight of infertile friends or relatives. Others said they enjoyed pregnancy, but did not want to raise another child themselves. They enjoyed parenting and wanted to help others who were unable to have children to become parents. A few surrogates said the prospect of payment was attractive, but none of the women in Hanafin's study said that money was the deciding factor for their participation.").

115. A study of 34 surrogates by the City University in London found that 31 (91%) stated they were motivated in part by "wanting to help a childless couple," 5 (15%) were motivated by the "enjoyment of pregnancy," 2 (6%) motivated by "self-fulfillment," and only 1 (3%) stated that compensation "was a motivating factor." Vasanti Jadvia et al., *Surrogacy: The Experiences of Surrogate Mothers*, 18 HUM. REPROD. 2196, 2199 (2003).

116. *Doe*, 487 N.W.2d at 487 ("The contracting couple, on the other hand, need to supply only the sperm and the compensation. While the surrogate endures the nine-month gestation period and all the attendant physical burdens and risks, the contracting couple are free to go about their lives, anticipating the delivery of their baby.").

117. MICH. COMP. LAWS ANN. § 722.851 (West 2002).

counsel.¹¹⁸ Utah goes a step further by requiring a home visit for the intended parents before a court will approve the contract.¹¹⁹

B. Proposed Model Michigan Surrogacy Law

Michigan should enact new legislation validating gestational surrogacy contracts and addressing several different areas that warrant regulation. First, and most importantly, the statute must establish comprehensive requirements for the intended parents and surrogate to ensure that all parties are willing and capable of entering into the agreement. The statute should also address the format of the contract and directions for a prebirth determination of parentage. The statute should additionally address the role of the judiciary, as well the availability of compensation for the surrogate and any residency requirements of the parties. Finally, the legislature should address how disputes regarding these surrogacy contracts would be resolved.

1. Requirements for Surrogates

The Michigan legislature should enact new legislation enforcing surrogacy contracts and, in doing so, create requirements to ensure that surrogates enter into contracts freely and voluntarily and are physically and mentally able to carry the baby. Illinois's GSA provides comprehensive requirements to ensure the protection of surrogates, and the Michigan legislature should find it highly instructive. Similar to Illinois, the Michigan legislature should require the surrogate to (1) be at least twenty-one years old, (2) have given birth to at least one child, (3) have completed a medical evaluation, (4) have completed a mental health evaluation, and (5) have received a consultation with independent legal counsel laying out the obligations under the contract.¹²⁰ Additionally, the legislature should require that the egg and sperm used to create the embryo not be from either the surrogate or her husband, thereby ensuring they have no genetic claim to the child.¹²¹ By enacting mandatory requirements such as these, the Michigan legislature would provide the power to regulate these contracts not only to courts, but also to mental health professionals and the surrogate's own independent counsel, creating an assembly line of

118. 750 ILL. COMP. STAT. 47/20(b)(3)–(4) (2010); N.H. REV. STAT. ANN. § 168-B:18 to -B:19 (1955 & repl. vol. 2002); UTAH CODE ANN. § 78B-15-803(2)(d) (LexisNexis 1953 & repl. vol. 2008).

119. UTAH CODE ANN. § 78B-15-803(2)(c).

120. 750 ILL. COMP. STAT. 47/20(a)(1)–(5).

121. UTAH CODE ANN. § 78B-15-801(7) to -801(8).

sorts to protect her interests and ensure she is capable of acting as a surrogate.

2. *Requirements for Intended Parents*

The Michigan legislature should also enact mandatory requirements for intended parents to ensure they are capable of caring for the resulting child.¹²² Following the lead of the Illinois, New Hampshire, and Utah legislatures, Michigan should require intended parents to undergo a medical evaluation to confirm there is a medical need for a surrogate pregnancy. A medical evaluation will help to prevent a baby-selling market from forming by ensuring the intended parents actually have some medical need to engage in the use of a surrogate. Like the surrogate, the intended parents should also be at least twenty-one years old and required to submit to a mental health evaluation.¹²³ However, unlike those states, the Michigan legislature should not require that the egg or sperm used to create the embryo be from either of the intended parents. This requirement would prevent couples like the Kehoes from obtaining protection under the surrogacy legislation because they were not genetically related to either of the twins. However, by enforcing contracts such as the Kehoes' while simultaneously requiring that neither the egg nor the sperm be provided by the surrogate or her husband, the statute would create a greater possibility of dispute regarding parentage because neither party could show a genetic relationship to the child. Therefore, the proposed statute must also require that a court establish parentage prior to birth. By doing so, the Michigan legislature would give power to the courts to regulate this unique type of contract.

3. *Requirements for the Contract*

Like New Hampshire's statute, Michigan should require that the contract be signed by the intended parents, the surrogate, and the surrogate's husband (if she is married).¹²⁴ By signing the contract, the intended parents would consent to all responsibilities of parenting the child, while the surrogate and her husband would consent to give up all claims to the child and relinquish custody immediately upon birth.¹²⁵ Additionally, the contract should include signed certificates from medical and mental health professionals stating that the in-

122. 750 ILL. COMP. STAT. 47/20(b)(2)-(3); N.H. REV. STAT. ANN. §§ 168-B:16(I)(a), B:17(II); UTAH CODE ANN. § 78B-15-803(2)(b), (d).

123. UTAH CODE ANN. § 78B-15-801(6).

124. N.H. REV. STAT. ANN. § 168-B:25.

125. *Id.*

tended parents and the surrogate underwent the required medical and mental health evaluations.¹²⁶ A written acknowledgement from the intended parents and surrogate that each retained independent counsel and were made aware of all obligations and penalties under the contract should also be included.¹²⁷ Most importantly, the contract should include a clause stating that custody vests with the intended parents immediately upon the birth of the child and need not be judicially approved after the birth.¹²⁸

4. *Prebirth Judicial Approval*

The procedures set forth under the Illinois GSA eliminate the need for judicial approval of the surrogacy contract,¹²⁹ thereby eliminating the cost of court and attorney fees that come with judicial approval and often leading to a shorter wait before the pregnancy can occur. However, due to Michigan's current refusal to enforce surrogacy contracts, requiring judicial pre-approval is the most appropriate path. In requiring judicial pre-approval, the Michigan legislation should follow Utah's model.¹³⁰ In Utah, the intended parents may petition a tribunal to validate the gestational surrogacy contract and establish the legal parents of the child.¹³¹ The new legislation should state that once the requirements for both the intended parents and surrogate have been met, the court shall issue an order validating the contract and establishing the intended parents as the legal parents of the child upon its birth. Finally, the new legislation should set forth a time period in which the court must approve the contract in order to ensure that the parties are not placed in limbo for an indeterminate period of time.¹³²

5. *Residency Requirement*

The proposed legislation should also include a residency requirement to avoid forum shopping and make certain that the Michigan court system is able to regulate these contracts.¹³³ Utah requires that

126. *Id.* § 168-B:16(1)(a).

127. 750 ILL. COMP. STAT. 47/20(a)(5), (b)(4).

128. *See id.* at 47/15(b).

129. KINDREGAN & MCBRIEN, *supra* note 9, at 157.

130. UTAH CODE ANN. § 78B-15-801 (LexisNexis 1953 & repl. vol. 2008).

131. *Id.* § 78B-15-802.

132. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 703 (Proposed Official Draft 2008).

133. Illinois has become a "magnet" for gestational surrogacy contracts because the GSA does not contain a residency requirement. Richey, *supra* note 12, at 187. For an example of this notion, in *In re Adoption of Samant*, a couple from New York used a surrogate from California but wanted to adopt the child in Arkansas due to Arkansas's short residency requirement. 970 S.W.2d 249, 250 (Ark. 1998). California required a six-month residency requirement and New

either the intended parents or the surrogate reside within the state for ninety days before they may petition for court approval of the surrogacy agreement.¹³⁴ A residency requirement would help ensure that the parties stay in Michigan to carry out the pregnancy and give the legislature a greater ability to regulate gestational surrogate pregnancies.

6. *Compensation*

Compensation for surrogate pregnancy services has been the topic of much heated debate, with Michigan going so far as to impose criminal penalties on those who engage in surrogacy contracts for compensation.¹³⁵ For the states that allow compensation in surrogacy contracts, questions arise as to how to regulate compensation and how to define what is considered reasonable compensation.¹³⁶ By allowing compensation in surrogacy contracts, the Michigan legislation would be able to set forth requirements—possibly strict requirements—and give courts the power to regulate this compensation. If nothing else, the legislature should repeal the criminal penalties for contracts providing compensation, as these penalties paint Michigan as the most antisurrogacy state in the United States.¹³⁷

7. *Contract Disputes*

Like any contract, it is inevitable that there will be disputes. The Michigan legislature should require courts to follow the intent doctrine established in California case law to remedy these disputes.¹³⁸ The judicially created intent doctrine looks to the original intent of

York does not enforce surrogacy contracts. *Id.* In order to establish residency in Arkansas, Mrs. Samant lived in a hotel for thirty days. *Id.*

134. UTAH CODE ANN. § 78B-15-802(2).

135. Richey, *supra* note 12, at 184–85. “Intended parents in Michigan wanting to reproduce via gestational surrogacy might face undesirable consequences if they try to form surrogacy contracts under their own laws. For example, they could lose custody of their genetic offspring or face criminal sanctions.” *Id.* at 185. It should be noted that Illinois’s favorable gestational surrogacy legislation makes Illinois an attractive option for Michigan couples looking to enter into these contracts, especially due to the proximity of the states. *Id.*

136. *Id.* at 185–86. The language used by the GSA regarding compensation is broad and does not provide much direction as to what constitutes “reasonable.” *Id.* The only list it provides of acceptable expenses contains broad categories of medical, legal, and professional, and qualified by the term “without limitation.” *Id.* at 185. “The Illinois reasonableness standard is too gray and uncertain. It will be interesting to see how courts address excessive compensation if the issue arises in the future. Rather than have such a scenario arise, it would be better if the General Assembly set some clear boundaries.” *Id.* at 186.

137. KINDREGAN & MCBRIEN, *supra* note 9, at 163. “Michigan has the harshest penalties for entering into or facilitating a surrogacy contract.” Arshagouni, *supra* note 14, at 806.

138. See *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

the parties to determine parentage when genetics and biology cannot provide a clear resolution.¹³⁹ The obligations and ramifications of a surrogacy contract are clear. The intent of the parties can be easily discerned by the courts.¹⁴⁰

IV. IMPACT

If the Michigan legislature were to enact the proposed amendments to the SPA, significant changes would occur with regard to surrogate pregnancies and potential surrogacy contracts. By imposing requirements on the intended parents and the surrogate, surrogacy contracts would be validated and a legal recourse for determining the parentage of children born via surrogate would be established.¹⁴¹ Upholding surrogacy contracts through judicial approval would require involvement from the courts to validate the contract and determine parentage.

A. *The Impact of a New Gestational Surrogacy Law on Contracting Parties*

1. *Impact on Intended Parents*

While there is currently no contractual protection in Michigan for intended parents or surrogates, surrogate pregnancies are easier to begin in Michigan than in states like Illinois, New Hampshire, and Utah due to those states' implementation of specific requirements for both intended parents and surrogates.¹⁴² The creation of similar requirements in Michigan would potentially make the process of having a child via surrogate much longer. Even so, the certainty of a judicial order determining parentage of the child before birth provides protection to the intended parents that would greatly outweigh any potential delay.¹⁴³

139. *Id.*

140. Some argue that following the intent doctrine in this context would lead courts to determine that the biological creators of an unplanned, but ultimately desired, child are not considered the legal parents. Schultz, *supra* note 81, at 283. However, advocates of the intent doctrine contend that the intent of the parties is only used to determine parentage when there are conflicting claims by the parties involved. *Id.* Therefore, where there are not "intentional parents," the biology of the child is used to determine its legal parents. *Id.*

141. See UTAH CODE ANN. § 78B-15-802 (LexisNexis 1953 & repl. vol. 2008); KINDREGAN & MCBRIEN, *supra* note 9, at 176.

142. See 750 ILL. COMP. STAT. 47/20 (2011); N.H. REV. STAT. ANN. § 168-B:13 (1955 & repl. vol. 2002); UTAH CODE ANN. § 78B-15-801.

143. These types of statutory schemes protect the interests of the intended parents by allowing for prebirth parentage determination. 750 ILL. COMP. STAT. 47/5 ("The purpose of this Act is to establish consistent standards and procedural safeguards for the protection of all parties in-

The proposed legislation would also provide contractual protection to individuals and couples who do not have a genetic relationship to the child born via surrogacy. Even in those states that uphold such contracts, these individuals have been unable to utilize a gestational surrogacy contract. Illinois, New Hampshire, and Utah all require that at least one of the intended parents have a genetic relationship to the child: either the egg of the intended mother or sperm of the intended father must be used in the IVF procedure.¹⁴⁴ However, this requirement categorically leaves out couples and individuals who, for varying reasons, are unable to utilize the egg or sperm of the intended parents. For example, a woman diagnosed with cancer during her childhood or childbearing years may become infertile due to her cancer treatment's toxic effect on her reproductive organs.¹⁴⁵ "[M]any people are able to live longer lives, yet feel that their lives are incomplete because they became infertile."¹⁴⁶ Couples may also decide to utilize both an egg and sperm donor for fear that they themselves may pass a genetic disorder to their child. A recessive genetic disorder requires the presence of a disease gene from each of the parents, resulting in a twenty-five percent chance that a child born to parents carrying the gene will have the genetic disorder.¹⁴⁷ Examples of recessive genetic disorders include cystic fibrosis and Tay-Sachs disease.¹⁴⁸ Parents who have been identified as carriers of a disease gene or who have given birth to a child with a genetic disorder may wish to conceive a child via surrogate utilizing both an egg and sperm donor in order to remove the risk of passing along the genetic disorder.

Under the frameworks of Illinois, New Hampshire, and Utah, people in these reproductive situations are unable to create a valid gestational surrogacy contract. In contrast, the proposed legislation

involved in a gestational surrogacy contract in this State and to confirm the legal status of children born as a result of these contracts.").

144. 750 ILL. COMP. STAT. 47/20(b); N.H. REV. STAT. ANN. § 168-B:17(III); UTAH CODE ANN. § 78B-15-801(5).

145. See Gregory Dolin et al., *Medical Hope, Legal Pitfalls: Potential Legal Issues in the Emerging Field of Oncofertility*, 49 SANTA CLARA L. REV. 673, 673-74 (2009) ("[O]ver the last forty years, survival rates for childhood cancer have risen from twenty percent to eighty-one percent. However, the very success of new and improved therapies has created a host of problems that were not previously considered. One of the results of the increased rate of post-cancer survival is the commensurate desire of former cancer patients to return to healthy lives, which for many includes having children." (footnote omitted)).

146. *Id.* at 674.

147. *Frequently Asked Questions About Genetic Disorders*, NAT'L HUM. GENOME RESEARCH INST., <http://www.genome.gov/pfv.cfm?pageID=19016930> (last visited Aug. 26, 2011).

148. *Id.* "Cystic fibrosis (CF) is the most common, fatal genetic disease in the United States." *Learning About Cystic Fibrosis*, NAT'L HUM. GENOME RESEARCH INST., <http://www.genome.gov/10001213> (last visited Aug. 26, 2011).

provides contractual protection to both the woman with cancer and the parents at risk for passing along a genetic disorder because it does not require that the child have a genetic relationship to the intended parents.

2. *Impact on Surrogates*

The proposed legislation sets forth requirements that surrogates must meet in order to be a party to a judicially approved surrogacy contract. The potential impact on surrogates is threefold. Surrogates must be determined medically fit not only to conceive and carry the child, but also to deal with the potential stress of giving the child to the intended parents upon its birth. The medical evaluation impacts surrogates because the requirements impose procedures and evaluations that may be time consuming and intrusive. Some women may be prevented from serving as a surrogate due to issues discovered during these evaluations. Under the current SPA, there is no standard that a woman is required to meet in order to serve as a surrogate.

The proposed changes to the SPA would also impact surrogates by providing them with information about the intended parents before the pregnancy even begins. Such information would include the mental health status of the intended parents, which could be vital to a woman's decision to act as a surrogate. Laschell Baker stated that if she had been made aware of Amy Kehoe's mental illness she likely would not have gone through with the pregnancy, and the ensuing custody battle would not have occurred.¹⁴⁹

Finally, changes to the SPA would impact potential surrogates by providing assurance through the judicially approved surrogacy contract providing that the intended parents are legally responsible for the child.¹⁵⁰ A surrogacy contract would legally determine the parentage of the child prebirth, which would remove any legal responsibility of the surrogate as the biological parent of the child. This contractual protection has the potential to encourage some women to serve as a surrogate because of the legal determination of parentage, but it may also dissuade women who may be unsure about the idea of having no legal connection to the child after its birth.¹⁵¹

149. Saul, *supra* note 2.

150. See 750 ILL. COMP. STAT. 47 (2010).

151. See Lorillard, *supra* note 21, at 250.

Proponents of surrogacy, however, point out that surrogacy contracts must be deemed voluntary precisely because they are made *prior* to conception, and thus require the surrogate's voluntary and active participation in order to become pregnant. Additionally, most surrogacy arrangements "proceed routinely to the conclusion de-

3. *Impact on the Court System*

Requiring judicial pre-approval of the surrogacy contract dictates involvement from the court system. Due to the sensitive issues addressed by surrogacy contracts, courts experienced in family law and child-placement issues are best suited to validate surrogacy contracts and make the prebirth parentage determinations.

The proposed legislation's greatest impact on the court system is likely the potential burden that requiring judicial approval of surrogacy contracts may impose on an already overloaded court system. However, the relatively small number of pregnancies that occur via surrogate each year may not impose such a burden as to outweigh the benefits of regulating surrogate pregnancies and accompanying contracts.¹⁵² New Hampshire's experience should be instructive, as the legislature enacted a system of judicial approval that has remained since the implementation of the statute.¹⁵³

If the Michigan legislature determines that requiring judicial pre-approval like New Hampshire imposes too great a burden on the Michigan court system, there are other formats that do not require judicial involvement.¹⁵⁴ Illinois, for example, eliminates the need for court supervision by requiring only a certification of the prebirth parentage request by the Department of Public Health.¹⁵⁵ While requiring judicial approval is the most comprehensive format to protect the interests of all parties to a surrogacy contract, the Illinois framework provides an alternative that may be utilized if judicial efficiency becomes a concern standing in the way of legislation validating surrogacy contracts.

V. CONCLUSION

Michigan's Surrogate Parenting Act is completely outdated by today's technological standards.¹⁵⁶ An umbrella of federal regulation would be ideal to regulate these interactions and contracts;¹⁵⁷ however, immediate attention should be given to Michigan's SPA due to its strict penalties and outright ban of gestational surrogacy contract.

sired by all parties at the outset—a woman who can bear children assisting a childless couple to fulfill their desire for a biologically-related child.”

Id. (footnotes omitted) (quoting *Surrogate Parenting Assocs., Inc. v. Commonwealth*, 704 S.W.2d 209, 214 (Ky. 1986)).

152. *IVF Success Rate Reports*, *supra* note 92.

153. N.H. REV. STAT. ANN. § 168-B:16(I) (1955 & repl. vol. 2002).

154. See 750 ILL. COMP. STAT. 47/25.

155. *Id.* at 47/35.

156. KINDREGAN & MCBRIEN, *supra* note 9, at 163.

157. See generally Arshagouni, *supra* note 14.

The SPA provides no regulation or oversight of surrogate pregnancies and provides judicial intervention when a dispute arises. Michigan should amend the SPA. The new legislation should provide requirements that the intended parents, surrogate, and contract must meet in order for a surrogacy contract to be validated. By introducing these requirements, the legislature can create safeguards to ensure that the interests of all parties to the contract are protected and that the resulting child is put in the safest environment possible upon its birth. If the Kehoes and Laschell Baker had been afforded contract protection when they decided to enter into a surrogacy arrangement, the resulting custody battle would not have occurred. The issues that arose after the birth of the twins would have been addressed before the pregnancy even began. The current SPA is outdated and ineffective because it does not prevent surrogate pregnancies from occurring, it simply turns a blind eye to their existence. Michigan should amend the Surrogate Parenting Act to uphold the validity of gestational surrogacy contracts when all parties to the contract have met the requirements set forth by the new statute.

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